SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-41

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,
Petitioner,

vs.

FLAIR BUILDERS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONER.

BERNARD M. BAUM,
DANIEL S. SHULMAN,
ROBERT H. BAUM,
29 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Petitioner.

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	2
Nature of the Case	2
The Facts: Collective Bargaining History	5
Union Relations with the Company, 1964-1966	6
The New Master Collective Bargaining Agreement 1966	8
Union Relations with the Company 1967-1968	8
Argument:	
Once a federal court determines that a dispute is arbitrable, the issue of delay in seeking arbitration is for an arbitrator rather than the federal court.	11
Conclusion	23

CITATIONS.

Cases.

Amalgamated Clothing Workers v. *Ironall Factories Co.*, 386 F. 2d 586 (6th Cir. 1967) 11, 19, 20, 21

Boy's Markets, Inc. v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970) 12, 19, 23

Deaton Truck Line v. *Local 612, Teamsters*, 314 F. 2d 418 (5th Cir. 1962) 20

Halcon Int'l. Inc. v. *Monsanto-Australia Ltd.*, 446 F. 2d 156 (7th Cir. 1971), *cert. denied*, ... U. S. ....., 92 S. Ct. 286 ..... 21, 22

Hoehn v. *Crews*, 144 F. 2d 665 (10th Cir. 1944), *cert. denied*, 323 U. S. 773 14

IUE v. *Westinghouse Electric Co.*, 218 F. Supp. 82 (S. D. N. Y. 1963), *aff'd per curiam*, 326 F. 2d 758 (2d Cir. 1964) 20

John Wiley & Sons v. *Livingston*, 376 U. S. 543 (1964) 11, 13, 14, 16, 17, 19, 20

Local 51, Int'l. Brotherhood of Electrical Workers v. *Illinois Power Co.*, 357 F. 2d 916 (7th Cir. 1966), *cert. denied*, 385 U. S. 850 20

Local 174, Teamsters v. *Lucas Flour Co.*, 369 U. S. 95 (1962) 12

Local 198, Rubber Workers v. *Interco, Inc.*, 415 F. 2d 1208 (8th Cir. 1969) 20

Local 490, Rubber Workers v. *Kirkhill Rubber Co.*, 367 F. 2d 956 (9th Cir. 1966) 20

Local 595, Dist. 152 v. *Howe Sound Co.*, 350 F. 2d 508 (3rd Cir. 1965) 20

Local 1401, Retail Clerks Int'l. Ass'n. v. *Woodman's Food Market, Inc.*, 371 F. 2d 199 (7th Cir. 1966) ... 20

Machinists v. *Hayes Corp.*, 296 F. 2d 238 (5th Cir. 1961) 20

Mogge v. *Dist. 8, Int'l. Ass'n. of Machinists*, 387 F. 2d 880 (7th Cir. 1968), *cert. denied*, 391 U. S. 936 20

Rochester Telephone Corp. v. *Communication Workers of America*, 340 F. 2d 237 (2d Cir. 1965) 21

Textile Workers v. *Lincoln Mills*, 353 U. S. 448 (1957) 12, 19, 22, 23

Tobacco Workers, Local 317 v. *Lorillard Corp.*, 448 F. 2d 949 (4th Cir. 1971) 11, 14, 16, 18, 21

United Steelworkers of America v. American Int'l. Aluminum Corp., 334 F. 2d 147 (5th Cir. 1964), *cert. denied*, 379 U. S. 991 20

United Steelworkers of America v. *American Mfg. Co.*, 363 U. S. 564 (1960) 13, 19

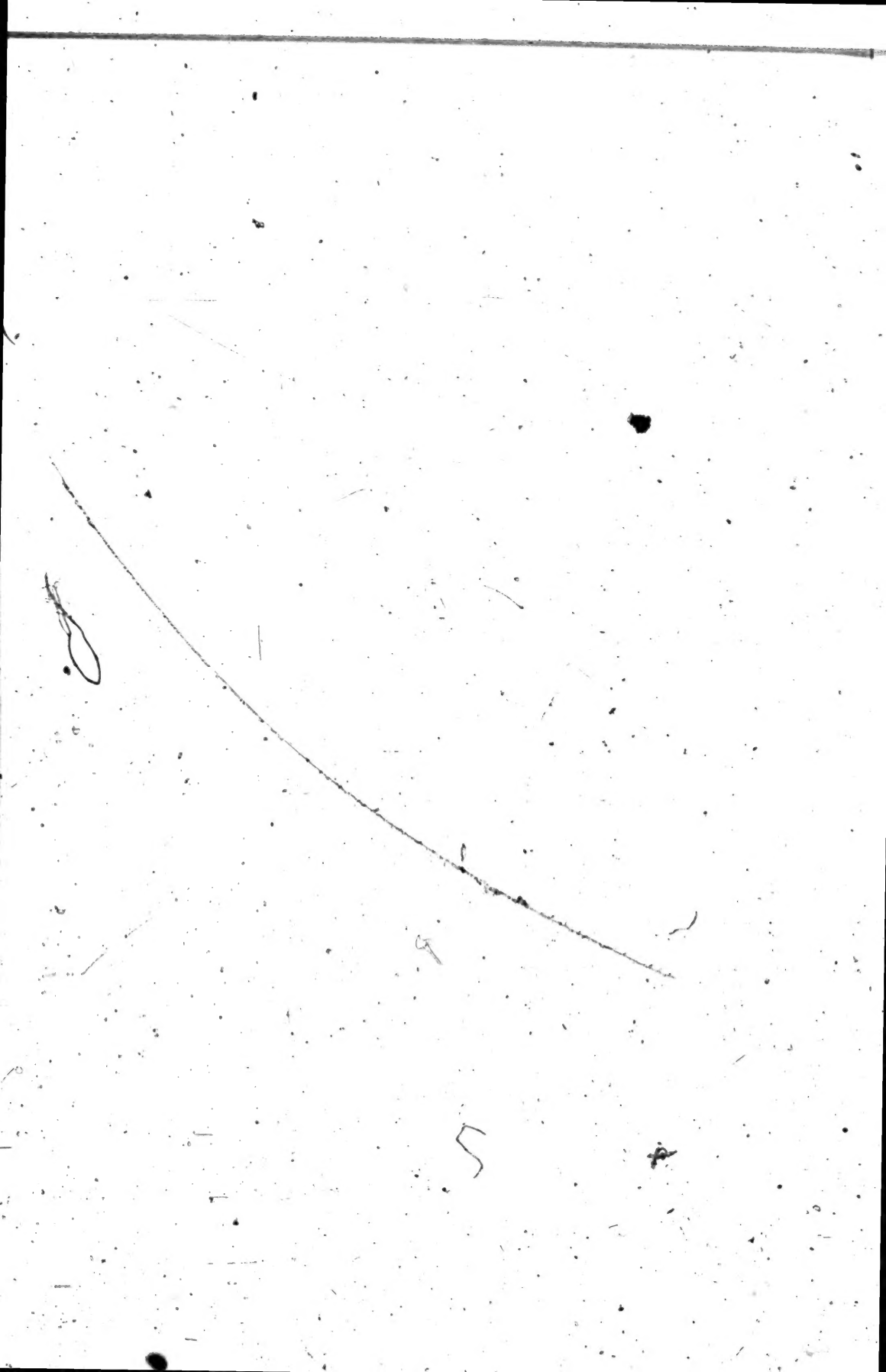
United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960) 13, 19

United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) 13, 17, 18, 19

United States Statutes.

Federal Rules of Civil Procedure, Rule 8(c) 22

Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. 185(a), Section 301, as amended 2, 3, 12



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OPINION BELOW.

The Opinion of the Court of Appeals is reported at 440 F. 2d 557 (7th Cir. 1971) and is presented in its entirety in the Appendix (pages 152 to 160). The Memorandum Opinion of the District Court is reported at ..... F. Supp. ..... (N. D. Ill. 1969), 76 LRRM 2594, and is printed in its entirety in the Appendix (pages 148 to 150).

JURISDICTION.

The judgment of the Court of Appeals was entered on February 5, 1971. Rehearing was denied on April 12, 1971. The Petition for Certiorari was filed on July 8, 1971 and was granted on December 7, 1971. The jurisdiction of this Court rests on 28 U. S. C. § 1254 (1).

QUESTION PRESENTED.

Once a federal court has determined that a dispute is arbitrable under the terms of a collective bargaining agreement, must questions of delay in seeking arbitration such as laches be decided by an arbitrator rather than the federal court?

STATUTE INVOLVED.

The statute involved herein is the Labor-Management Relations Act, 1947, Title III, § 301, 61 Stat. 156, 29 U. S. C. 185(a), as amended, which reads as follows:

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT.

Nature of the Case.

The Petitioner, International Union of Operating Engineers, Local 150, AFL-CIO (hereinafter referred to as the "Petitioner" or "Union"), initially brought suit in the Federal District Court seeking specific enforcement of its collective bargaining agreement to which the Union and the Respondent, Flair Builders, Inc. (hereinafter referred to as the "Respondent" or "Company"), were parties. The initial complaint was filed on November 7, 1968 and was brought pursuant to Section 301 of the

Labor-Management Relations Act of 1947, as amended (App. 3).

In dismissing the initial complaint, the District Court held that the primary controversy between the parties was whether the agreement executed by the parties constituted a binding collective bargaining agreement (App. 13), and that said dispute should be submitted to arbitration (App. 13).

Thereafter, the Union demanded arbitration (App. 21), which demand was refused by the Company (App. 28).

Accordingly, on June 3, 1969, pursuant to leave of Court, the Union filed its amended complaint requesting the enforcement of its demand for arbitration (App. 15).[1]

The Company thereafter filed a motion to dismiss alleging that the Union was guilty of laches in seeking arbitration (App. 22-23). The District Court denied the Motion to Dismiss and held that laches is a procedural question which should be decided by an arbitrator and not by a federal court (App. 25-26).[2]

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1. The gravamen of the Amended Complaint set forth the following allegations: 1) the execution of a Memorandum of Agreement by the Company and the Union; 2) the adoption of an existing Master Collective Bargaining Agreement by said Memorandum; 3) the continuing violations by the Company of the provisions of the Agreements; 4) the repeated demands by the Union that the Company adhere to the provisions of the aforementioned Agreements; 5) the Company's refusal to comply with said demands; 6) the holding of the Trial Court that the existence of the Agreement should be submitted to arbitration; 7) the Union's demand for arbitration and the Company's refusal of same (App. 15-18).

2. On the issue of laches, the Trial Court held as follows:

> Defendant also claims that the cause of action is stale and barred by laches. In *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 557 (1964), the Supreme Court explained that:
>
> > Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration,

In addition, the Court ordered a hearing for the *limited purpose* of determining whether the parties entered into a binding collective bargaining agreement (App. 26).

The hearing was held on October 24, 1969.

At the hearing the Court attempted to limit the testimony to the question of whether the collective bargaining agreement was executed and contained an agreement to arbitrate. The Court stated and Counsel for the Company agreed that the question of laches was for the arbitrator and not for the Court (App. 90-93).[3]

'procedural' questions [as well as substantive issues] which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

Therefore, if the employer consented to the alleged collective bargaining agreement, the laches issue should be decided by the arbitrator rather than the federal courts (emphasis supplied) (App. 25).

3. In this connection the following statements by the Trial Court and Counsel for the Company at the hearing should be noted:

The Court: . . . I pointed it out very clearly, that if the agreement was executed, if there was an agreement, the question of abandonment is for the arbitrator, along with the other issues in the case (App. 90).

* * * * *

. . . I mean, once the agreement is established, whether you like it or not, and whether I like it or not, I might say, I am bound by what the law provides, and that is that, *the initial agreement says that you submit it to arbitration; that's where it has to go* (emphasis supplied) (App. 91).

* * * * *

The Court: Well, there is a difference of opinion, apparently, as to whether one single thing is done after he was signed up. Mr. Meagher said that he talked to him a couple of times; this witness denies it. Now, you have—but that isn't for me. *That's for the arbitrator* (emphasis supplied) (App. 92).

* * * * *

The Court: I said: . . . "Therefore, if the employer consented to the alleged collective bargaining agreement . . ."—and that the abandonment issue, *the laches issue and the*

Thereafter, the District Court held in a written opinion that the Company was bound by the collective bargaining agreement and accordingly was obligated to arbitrate the dispute (App. 149). However, notwithstanding the limited scope of the hearing and its prior holding that the issue of laches must be decided by an arbitrator, the District Court, nevertheless determined the issue of laches, found the Union guilty of same and dismissed the amended complaint (App. 149-150).

The Seventh Circuit subsequently affirmed the decision of the District Court, Judge Stevens dissenting (App. 152-160).

The Facts:

Collective Bargaining History.[4]

The Union negotiates master collective bargaining agreements with several contractor associations in the State of Illinois (App. 47, 55, 102, 123, Ptf. Exhs. 1 and 3). In addition, the Union enters into individual memoranda of agreement with contractors who are not members of the contractor associations (App. 48, 54, 121-122, Ptf. Exh. 2). Such a memorandum specifically adopts and binds the Union and the non-member contractor to the terms and conditions of a master agreement (App. 121, Ptf. Exh. 2).

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abandonment issue should be decided by the arbitrator rather than by the Court.

Mr. Murphy: Well, *I can agree with the laches* (emphasis supplied) (App. 93).

* * * * *

The Court: The question is whether the agreement to arbitrate ever came into existence. *I hold that it does* (emphasis supplied) (App. 93).

4. At the hearing, the Union presented evidence to establish the existence of the collective bargaining agreements between the parties. In order to demonstrate the existence of these agreements, testimony was elicited and evidence produced relating to the execution of the agreements and the various visits by the Union's business agent to the Company's job sites.

On June 1, 1963, the Union entered into a master collective bargaining agreement (hereinafter referred to as the "Master Agreement"), with various contractor associations covering building construction in Will, Kendall, Grundy, Kane and Kankakee Counties, Illinois (App. 47-48, 102, Ptf. Exh. 1). Thereafter, on May 12, 1964, the Union and the Company, which was not a member of any of these contractor associations, executed a memorandum of agreement (hereinafter referred to as the "Memorandum") (App. 45-46, 48-49, 72, 84, 121, Ptf. Exh. 2). This Memorandum specifically adopted and bound the Company to the terms and conditions of the aforementioned existing Master Agreement (App. 121, Ptf. Exh. 2). In addition, under the terms of the Memorandum, the Company agreed to adopt any additional Master Agreements entered into by the Union and the Fox Valley Contractors Association, one of the signatory contractor associations to the Master Agreement (App. 54, 121, Ptf. Exh. 2).

Union Relations with the Company 1964-1966.

At the time the Memorandum was executed by the parties, the Company employed one Jerry Rumsey to operate equipment covered by the Master Agreement (App. 43-44, 83, 85). Rumsey became a member of the Union on the same day the Memorandum was signed (App. 44, 46, 72). Rumsey did not have enough money to pay the initiation fee and accordingly, Robert V. Richards, the Company President, advanced Rumsey the necessary funds (App. 46, 72, 84). Thereafter, the Union's business agent, Ambrose Meagher, received a number of complaints from Rumsey that he was not being paid the wage scale set forth in the Master Agreement (App. 49-51, 99). Meagher went out to the Company's job site a number of times to investigate the complaints and advised Richards to pay the

correct wage scale (App. 49-51). However, Richards refused to pay the appropriate wage scale and even admitted that he was paying wages which were less than those required by the Master Agreement (App. 49-51). After these numerous attempts to secure his correct wages, Rumsey quit (App. 51, 65, 85-86). Meagher made one more attempt to obtain the full wages for Rumsey after the latter had quit; however, Richards refused to pay same and Rumsey did not press the issue any further (App. 51). At the hearing, Richards admitted that he had not paid the correct wage scale since he had advanced Rumsey's initiation fee and was deducting the fee from Rumsey's wages (App. 99), but denied having any conversations with Meagher about it either while Rumsey was on the job or after he had quit (App. 85-86, 98-99).

After Rumsey quit, the Company subcontracted certain excavating work to another employer (App. 52, 87-88). During the summer of 1964, Meagher visited the job site several times, observed this subcontractor performing the excavating work and had some conversations with him (App. 52). Accordingly, the Union had no complaints in regard to its Agreement with the Company during this period since the excavating work covered by that Agreement was being performed by the subcontractor and not by the Company (App. 52).

In 1965 and 1966, Meagher, the Union's business representative, again made a number of visits to the Company's construction site (App. 52-53). He observed the subcontractor performing excavation work and had various conversations with him and accordingly had no contract disputes to take up with the Company (App. 52-54, 92, 94, 97-98).

Richards testified that during 1965 some of his non-union employees operated equipment which came within the scope of the Master Agreement (App. 87-88).

The New Master Collective Bargaining Agreement—1966.

On June 1, 1966, the Union and the aforementioned contractor associations entered into a new Master Collective Bargaining Agreement (hereinafter referred to as the "New Master Agreement") (App. 54-55, 123, Ptf. Exh. 3). Under the terms of the existing Memorandum and specifically paragraph 3 therein, the Union and the Company had agreed to adopt the terms and conditions of any new Master Agreement entered into between the Union and the Fox Valley Contractors Association unless either party gave notice of termination (App. 121-122, Ptf. Exh. 2). In order to terminate the Memorandum, either party was required to give notice of termination at least three calendar months prior to the expiration of the existing Master Agreement (App. 121-122, Ptf. Exh. 2). However, neither party terminated the Memorandum and accordingly, both parties became bound to the new Master Agreement (App. 54-55).

During the winter of 1966-1967, Meagher visited the construction site a few times and observed that the job had been shut down (App. 56).

Union Relations with the Company—1967-1968.

1967—The Company's Attempt to Avoid the Union Security Provision as Well as the Entire New Master Agreement.

In the Spring of 1967, Meagher received a complaint that a non-union man was operating equipment on the Company's construction site. Meagher investigated the complaint, spoke with the non-union employee and told Richards that the employee was required to join the Union pursuant to the union security provision of the New Master Agreement (App. 56-57, 67-69). However, Richards refused to cooperate (App. 57).

Thereafter, Meagher visited the job site on several occasions and each time he observed a different non-union employee operating equipment (App. 58-59, 67-68, 98). Meagher contacted Richards each time and explained that employees covered by the New Master Agreement were required to join the Union; however, Richards refused to comply with the terms of the New Master Agreement (App. 58-59, 98).

Finally, in the Fall of 1967, Meagher again warned Richards that he was required to live up to the terms of the New Master Agreement, and Richards replied that he was never going to abide by the New Master Agreement and threatened to have Meagher arrested (App. 59). Richards, at the hearing, denied any conversations with Meagher during 1967 (App. 94, 97-98).[5]

During the winter of 1967-1968 Meagher visited the job site a few times and observed no activity on the site (App. 59).

1968.

In June, 1968, Meagher visited the job site and discovered another non-union employee, one Floyd Schimmelpfennig, operating equipment (App. 60, 68). Meagher and Schimmelpfennig had a conversation, the result of which was that the latter decided to join the Union (App. 60-61, 69-70). Shortly thereafter, in July, Schimmelpfennig joined the Union, and Meagher went to the job site and told Richards

5. In addition to Richards, the Company called Richards' brother, Thomas Stanley Richards, a foreman for the Company, as a witness (App. 77). Initially, the foreman attempted to convey the impression that no one from the Union had visited the Company's job site prior to 1969 (App. 77-78). However, when pressed on cross-examination, this witness admitted that he was not always on the job site and further that representatives of the Union might have visited the Company's office which was located off the job site (App. 80-81).

he would have to abide by the terms of the New Master Agreement in regard to Schimmelpfennig's employment (App. 61, 94). Richards refused to abide by the New Master Agreement, stated that he did not believe in the Union and that he was not going to pay the union wage scale (App. 61, 94). Schimmelpfennig did not receive the union scale, and accordingly, a week later, Meagher and William Anderson, another business representative of the Union, visited the job site and demanded that Richards pay the correct wages (App. 62, 75-76, 94-95, 98). Richards again refused to pay the wages in accordance with the scale set forth in the New Master Agreement (App. 62, 75).

Subsequently, the Union filed a complaint with the Wage and Hour Division of the Department of Labor on behalf of Schimmelpfennig for back wages (App. 63). The wage and hour complaint was substantiated in favor of Schimmelpfennig (App. 63). Thereafter, the Company discharged Schimmelpfennig, and an unfair labor practice charge was filed against the Company with the National Labor Relations Board (App. 63). As a result, Schimmelpfennig received back pay and was offered reinstatement as part of a settlement agreement between the Labor Board and the Company (App. 63).

Thereafter, the Union filed suit to enforce its collective bargaining agreement (App. 62-63).

ARGUMENT.

Once a Federal Court Determines That a Dispute Is Arbitrable Under the Terms of a Collective Bargaining Agreement, the Issue of Delay in Seeking Arbitration Is for an Arbitrator Rather Than the Federal Court.

In the instant case, the District Court, in its opinion ordering the hearing on the issue of arbitrability, held that that the question of laches was for the arbitrator and not for the court. In this regard the District Court relied on this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964). At the hearing, the Court reiterated its position that the issue of laches was for the arbitrator, and Counsel for the Company agreed. At this point in the litigation it did not appear that there was any dispute on the very issue which is now before this Court.

Subsequent to the conclusion of the hearing on arbitrability, the District Court rendered a written opinion in which it found that the Company was bound by the collective bargaining agreement to arbitrate. However, the Court then totally reversed its position on the issue of laches and made a determination of same which was adverse to the Union.

On appeal, the Seventh Circuit affirmed the decision of the District Court, Judge Stevens dissenting. The Majority opinion relied primarily on the previous decision of the Sixth Circuit in *Amalgamated Clothing Workers* v. *Ironall Factories, Co.*, 386 F. 2d 586 (6th Cir. 1967). Thereafter, the Court of Appeals for the Fourth Circuit in *Tobacco Workers, Local 317* v. *Lorillard Corp.*, 448 F. 2d 949 (4th Cir. 1971), held that laches was an issue for the arbitrator and that the opinion of the Seventh Circuit was incorrect.

Accordingly, the question presented in the instant case is what is the appropriate forum to determine the issue of laches where it has been found by the federal court that the parties have agreed to submit all differences and disputes under the terms of the contract to an arbitrator.

In order to determine this question, we must first look to the development of the federal common labor law fashioned by the federal courts pursuant to Section 301 of the National Labor Relations Act. This Court has fashioned a federal common law which limits the role of the federal court and concurrently expands the role of arbitration in labor disputes. The policy underlying this development in the law is to promote industrial peace by establishing arbitration as the central institution for the resolution of disputes between labor and management. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957); *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970). Another basic policy consideration is the union's *quid pro quo* in giving up its right to strike for the efficient and effective resolution of disputes through the arbitration process. *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962). Accordingly, this Court further expanded these considerations in the *Steelworkers Trilogy*[6] and limited the role of the federal courts in determining arbitrability to the threshold question of whether there exists a collective bargaining agreement and whether the language of that agreement is sufficiently broad to require the submission of the dispute to arbitration. As this Court stated:

> . . . The function of the court is *very limited* when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to *ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.* Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should-

> not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for. (363 U. S. at 567-568.) (Emphasis supplied.)

In the instant case the determination of the threshold question of arbitrability was found in favor of the Union by the District Court and was not contested in the Court of Appeals.

Subsequent to the *Steelworkers Trilogy*, the question of whether a federal court should also determine issues of delay in seeking arbitration was raised in *John Wiley & Sons, Inc.* v. *Livingston, supra.* In that case, this Court held that the specific question of delay must be decided by the arbitrator and not the federal court as follows:

> Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. . . . (376 U. S. at 557.)

The Court based its decision on several important policy considerations. They were (1) that the question of delay cannot ordinarily be answered without a consideration of the merits of the dispute which has been presented for arbitration;[7] (2) that delay would necessarily result from

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6. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

7. As the Court stated:

> Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or *whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration.* . . . (376 U. S. at 557) (Emphasis supplied)

judicial proceedings prior to the arbitration as well as (3) duplication of effort, and (4) increased costs.[8]

Let us then apply these policy considerations to the defense of laches as raised in the instant case.

Laches is an equitable doctrine which basically provides that, to bar a plaintiff's equitable relief there must be:

1. an unexplained or unexcusable delay in asserting a known right which
2. causes injury or prejudice to the defendant. *Hoehn v. Crews*, 144 F. 2d 665 (10th Cir. 1944), *cert denied*, 323 U. S. 773; *Tobacco Workers, supra.*

In the first instance, the question of whether delay in a case is excusable and has not prejudiced the defendant requires a factual inquiry. Questions such as whether the requirements of the arbitration clause need be followed where there has been a continuing violation by the employer of the entire agreement or whether compliance with the agreement was excused because it would have been a vain and useless act in view of the employer's express attitude that

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8. The Court's language in regard to considerations 2, 3 and 4, was as follows:

> . . . Reservation of "procedural" issues for the courts would thus not only create the difficult task of separating related issues, but *would also produce frequent duplication of effort.* . . . (376 U. S. at 558) (Emphasis supplied.)
>
> * * * * *
>
> While the courts have the task of determining "substantive arbitrability," there will be cases in which arbitrability of the subject matter is unquestioned but a dispute arises over the procedures to be followed. In all of such cases, acceptance of Wiley's position *would produce the delay attendant upon judicial proceedings preliminary to arbitration.* As this case, commenced in January 1962 and not yet committed to arbitration, well illustrates, *such delay may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) and contrary to the aims of national labor policy.* (376 U. S. at 558) (Emphasis supplied.)

there was no contract or whether there was a custom or practice to waive strict compliance with requirements under such circumstances all relate to a full and complete hearing on the merits. In fact, in the instant case the precise nature of the inter-relationship between the issue of delay raised by the defense of laches and the merits of the entire dispute was placed in its most direct perspective in the dissenting opinion of Judge Stevens below wherein he stated:

> The appropriateness of laches as a defense to a labor dispute involves a consideration of several questions which can best be answered by one who is familiar with the collective bargaining relationship between the parties. Although the trial court stated that the defense of the union's charges would impose an "extreme burden" on Flair, the record does not answer these questions: Does the area-wide master agreement contemplate that a small employer like Flair shall have the burden of full compliance with its terms? Would routine records ordinarily retained by employers disclose the information on which Flair relies to justify its disregard of its written undertakings? Was the lack of communication between the union and Flair entirely the fault of the union? Even if it was too late in 1968 for the union to question Flair's breaches in 1964 and 1965, was it also too late to ask a neutral third party to pass judgment on 1966 and 1967 breaches, as well as a continuing refusal to abide by the agreement?
>
> *The task of answering questions such as these—determining whether the union's delay was unreasonable and whether Flair's defense has been significantly prejudiced by that delay—inevitably involves a consideration of the merits of the underlying dispute between the parties. This task should, therefore, be performed by the arbiter who is also responsible for deciding the merits of the basic controversy.* (App. 159-160) (440 F. 2d at 561) (Emphasis supplied:)

Moreover, it must be remembered that in the instant case, the District Court had already decided that the issue of laches was for the arbitrator when it ordered a hearing limited to the question of whether there was a binding agreement requiring arbitration. Therefore, the entire tenor of the hearing was geared to determining the question of the existence of the collective bargaining agreement—arbitrability—and not the question of laches.[9]

Secondly, the resolution of laches by a federal court requires untold delay in bringing the matter to final resolution. Indeed, this is best illustrated by the instant matter. This case was initiated over three years ago and could have been resolved long ago in arbitration had the defense of laches been determined by an arbitrator. Instead, the District Court determined the issues of laches, an appeal was taken and the case is still pending before this Court. Obviously, lengthy delays must result since there are no precise benchmarks for determining laches and each case will have to be decided by the federal court on its own facts.

Moreover, there is also the duplication which this Court referred to in *Wiley, supra.* Had the District Court held against the Company on the issue of laches, the Company could still have attempted to have the issue determined by the arbitrator as part of the hearing on the merits of the dispute. This very consideration was recently underscored by the Fourth Circuit in its decision in *Tobacco Workers, supra,* wherein it stated:

> Not only does the resolution of whether the delay in this case is excusable require a factual inquiry and thus the delay attendant to an evidentiary hearing, but it is precisely the same factual inquiry that the arbitrator must engage in to determine whether the Union's failure to comply with the procedural time

9. In this regard there was no evidence presented on an essential element of laches namely: prejudice to the Company. See *Tobacco Workers, supra,* 448 F. 2d at 958-959.

> limits of the contract should bar relief. Judicial resolution of this question is a wasteful duplication of effort. This aspect of a laches defense is "independent of any procedure established by the collective bargaining agreement" only as a matter of semantics. If we were to decide that this issue was appropriate for judicial resolution, the company would have two chances for a favorable decision on the same issue. This is not only wasteful; it also seems unfair. Moreover, the arbitrator is in the best position to decide it. (448 F. 2d at 958.)

The final consideration stated by this Court in *Wiley*, was "increased costs." This again is best illustrated by the instant case. On January 12, 1972, Counsel for the Company advised this Court, "We must regretfully advise that due to the straitened financial conditions of our client we will be unable to file an answering brief, make oral argument, or otherwise appear in the above entitled matter." It is submitted that the three years of delay, costs incurred, and expensive litigation in the federal courts must be measured against the efficient and effective system of arbitration which is provided for in the collective bargaining agreement.

These considerations must also be measured against the unique role of arbitrators in labor-management disputes. In the first instance, a labor arbitrator normally brings to the resolution of an industrial dispute the expertise and flexibility that most judges do not have. It is obviously not a question of intellectual superiority but rather the plain fact that the grievance and arbitration procedure concerns the daily relationships of management and labor and is part of the contract which would benefit from interpretation by the arbitrator who has specialized knowledge in the field. As this Court has stated in *Warrior & Gulf*, *supra*:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help

> him fashion judgments may indeed be foreign to the competence of the courts. . . . *The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop*—is equally a part of the collective bargaining agreement although not expressed in it. *The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.* (363 U. S., at 581-582) (Emphasis supplied.)

Moreover, while contracts generally require interpretation, labor contracts require more interpretation or gap-filling than others. Labor agreements in which we are dealing with a continuing relationship between management and labor naturally produce unforeseen contingencies and problems which were not contemplated at the time the contract was executed. *Warrior & Gulf*, 363 U. S. at 578-580. As pointed out by the Fourth Circuit in its recent opinion in *Tobacco Workers*, *supra*:

> Labor agreements, therefore, require lots of gap filling. And the gaps must be filled in a manner suited to implement and smooth the production relationship. The traditional judicial rules of contract construction are too inflexible. "The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies, and the need for a rule even though the agreement is silent all require a creativeness in contract administration which is quite unlike the attitude of one construing a deed, a promissory note, or a 300-page corporate trust indenture." (448 F. 2d at 957.)

In light of the above, let us now review the decision of the Court of Appeals below as well as decisions on which it relied.

The Majority opinion of the Court below held that a federal court can go beyond determining the issue of arbitrability and determine defenses relating to a delay in seeking arbitration—laches. In taking this position, the Majority made no mention of the fundamental decisions of this Court limiting the role of the federal courts in *Textile Workers, supra; Steelworkers Trilogy, supra*; and *Boy's Markets, supra.* The only decision of this Court to which the Majority below addressed itself was *Wiley, supra.* However, in doing so that Majority cited *Wiley* as holding that *only* questions involving the technical compliance with the time limitations of a grievance procedure may be submitted to an arbitrator and that questions of delay in seeking arbitration such as laches may be determined by a federal court.

It is submitted that this was not the holding in *Wiley.* The facts in *Wiley* clearly demonstrate that the union therein never resorted to any grievance procedure but instead sought arbitration in the federal court. Accordingly, the issue of delay in *Wiley* bore no relationship to the technical compliance with the time limitations of the grievance procedure, but rather related to whether the union was guilty of delay in seeking arbitration in the federal court. Moreover, this Court in *Wiley* expressly held that questions relating to whether grievance procedures are followed, whether such procedures apply to a particular dispute, or "whether the unexcused failure to follow them avoids the duty to arbitrate" must be decided by an arbitrator since all of these questions involve consideration of the merits of the dispute. 376 U. S. at 557.

In addition, the Court below, in an attempt to justify its holding, engaged in semantic gymnastics by utilizing such terms as "intrinsic" and "extrinsic" and relied upon *Amalgamated Clothing Workers* v. *Ironall Factories, Inc.*,

386 F. 2d 586 (6th Cir. 1967).[10] In both cases, these Circuits attempted to say that laches was separate and apart from the contract, and therefore, that issue is not to be determined by the arbitrator. Oddly enough, when the Seventh Circuit had been previously confronted with an issue of delay which had been raised as an affirmative defense and which had been labeled as "waiver" rather than "laches," that Court, relying on *Wiley*, held that the delay issue was a question for the arbitrator. *Local 51, Int'l. Brotherhood of Electrical Workers* v. *Illinois Power Co.*, 357 F. 2d 916 (7th Cir. 1966), *cert. denied*, 385 U. S. 850.[11]

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10. The other authority regarding the issue of laches consists of *IUE* v. *Westinghouse Electric Co.*, 218 F. Supp. 82, 86 (S. D. N. Y. 1963), *aff'd per curiam*, 326 F. 2d 758 (2d Cir. 1964) in which the District Court, relying on the Second Circuit's decision in *Wiley*, held that the question of laches is for the arbitrator.

In addition, *Local 198, Rubber Workers* v. *Intereo, Inc.*, 415 F. 2d 1208 (8th Cir. 1969) held that laches was lacking while expressly disclaiming any decision on whether such a defense can be determined by a federal court. Also compare two cases decided prior to this Court's decision in *Wiley*: *Deaton Truck Line* v. *Local 612, Teamsters*, 314 F. 2d 418, 422 (5th Cir. 1962) and *Machinists* v. *Hayes Corp.*, 296 F. 2d 238, 244 (5th Cir. 1961) which concluded that questions of delay must be left to an arbitrator without any discussion of the issue.

11. *Illinois Power, supra*, involved a union which waited nine months after a dispute had arisen before it filed a grievance. The company raised the affirmative defense of waiver, and the Seventh Circuit held that under the *Wiley* doctrine, the issue of waiver must be decided by an arbitrator and not a federal court. See also the Seventh Circuit opinions in *Local 1101, Retail Clerks Int'l. Ass'n.* v. *Woodman's Food Market, Inc.*, 371 F. 2d 199 (7th Cir. 1966) and *Mogge* v. *Dist. 8 Int'l Assn. of Machinists*, 387 F. 2d 880 (7th Cir. 1968), *cert. denied*, 391 U. S. 936.

In addition: other circuits have relied upon *Wiley* in holding that questions of delay in seeking arbitration are for the arbitrator rather than the federal court. See *Local 595, Dist. 152* v. *Howe Sound Co.*, 350 F. 2d 508 (3rd Cir. 1965); *United Steelworkers of America* v. *American Int'l Aluminum Corp.*, 334 F. 2d 147 (5th Cir. 1964), *cert. denied*, 379 U. S. 991 (1965); *Local 190, Rubber Workers* v. *Kirkhill Rubber Co.*, 367 F. 2d 956 (9th Cir. 1966).

It is submitted that in terms of raising a defense of delay to a suit seeking arbitration, there is no substantive difference between laches and waiver other than a matter of semantics. Whether one labels the defense of delay as "laches," "waiver," or "procedural timeliness," a resolution of such a defense necessarily involves a determination of the merits of the dispute and bears directly upon the outcome and is accordingly for an arbitrator and not the federal court to decide.

Indeed, the fallacy of the semantic distinction by the Majority in *Flair* was aptly pointed out by the Fourth Circuit in *Tobacco Workers, supra,* wherein that Court, in rejecting the reasoning of the Majority opinion below, as well as *Ironall, supra,* stated as follows:

> This aspect of a laches defense is "independent of any procedure established by the collective bargaining agreement" only as a matter of semantics. (448 F. 2d at 958)

See also *Rochester Telephone Corp.* v. *Communication Workers of America,* 340 F. 2d 237, 238-239 (2d Cir. 1965). to its most recent decision in *Boy's Markets, supra.*

In addition, the reasoning of the Majority below has generated confusion in the Seventh Circuit as most recently highlighted in *Halcon Int'l. Inc.* v. *Monsanto-Australia Ltd.,* 446 F. 2d 156 (7th Cir. 1971), *cert. denied,* ..... U. S. ....., 92 S. Ct. 286 (1971). That case involved commercial arbitration, and the Court in another divided opinion held that, the defense of laches must be determined by an arbitrator rather than by the federal court. In that opinion, the Majority attempted to distinguish its decision from its opinion in *Flair* on the basis of the "intrinsic" and "extrinsic" concept. However, in the dissent in *Halcon,* Judge Swygert, who wrote the Majority opinion in the case below, stated that the "principles defining the respective spheres of jurisdiction between the courts and arbitrators" regard-

ing the decision of laches are the same in both *Flair* and *Halcon*, and accordingly the issue of laches should have been decided by the court in *Halcon*.

Thus, the confusion that is reigning in the Seventh Circuit is most illustrative as to why the issue of delay—irrespective of its label—should be decided by an arbitrator rather than by a federal court.

In addition, it is submitted that if a federal court is allowed to consider laches in determining arbitrability, a veritable Pandora's Box would be opened since defendants would then be able to raise other affirmative defenses allowed under Rule 8(c) of the Federal Rules of Civil Procedure such as waiver, duress and estoppel.[12] Accordingly, the process of arbitration would become a languid and inefficient method for resolving labor disputes and its hallmark will be delay and duplication rather than efficiency and effectiveness.

Finally, from a union's point of view, the consideration for giving up its right to strike is the agreement to arbitrate labor disputes. As this Court pointed out in *Textile Workers, supra:*

> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way. (353 U. S. at 455).

Once the availability of arbitration is removed from the context of a labor dispute, the consideration for maintaining industrial peace is effectively eliminated. Accordingly, it is submitted that a party who is subjected to extensive litigation over the determination of delay questions

12 Fed. R. Civ. P. 8(c).

such as laches may well resort to an alternative in the form of self-help—a strike or a lockout—to resolve the dispute. Obviously, this is precisely the consequence which this Court has steadfastly sought to avoid in its development of federal labor policy from *Textile Workers, supra*, to its most recent decision in *Boy's Markets, supra*.

For this reason, arbitration is not an alternative to litigation but is rather an alternative to a strike or lockout.

Suffice it to say, where the parties have agreed to arbitration pursuant to a collective bargaining agreement, the federal court should not determine issues of delay including laches, but rather it should be determined by the arbitrator if labor arbitration is to remain a viable and effective method for resolving labor disputes and maintaining industrial peace.

CONCLUSION.

For the reasons stated herein it is respectfully requested that judgment of the Court of Appeals below be reversed and that this Court order that the complaint for arbitration be enforced and that the Company be directed to submit the matter to arbitration.

Respectfully submitted,

BERNARD M. BAUM,
DANIEL S. SHULMAN,
ROBERT H. BAUM,
29 South LaSalle Street,
Suite 350,
Chicago, Illinois 60603,
(312) 236-4316,
Attorneys for Petitioner.

Dated at Chicago, January 19, 1972.

Syllabus

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO *v.* FLAIR BUILDERS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71-41. Argued April 10, 1972—Decided May 30, 1972

Petitioner union brought an action in June 1968 seeking damages and injunctive relief for respondent's alleged breach of their collective-bargaining agreement, charging that respondent had "continually violated" the contract since June 1966 by refusing to abide by any of its terms. The agreement provided for arbitration "of any difference . . . which cannot be settled . . . within 48 hours of the occurrence." The District Court held that respondent "was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause," but found the union guilty of laches and dismissed the action. The Court of Appeals affirmed. *Held:* As the District Court found, the parties did agree to arbitrate and, the existence and scope of an arbitration clause, being matters for judicial decision, the phrase "any difference" encompasses the issue of laches within the broad sweep of its arbitration coverage. Pp. 490–492.

440 F. 2d 557, reversed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinon, in which BURGER, C. J., joined, *post*, p. 492.

Bernard M. Baum argued the cause for petitioner. With him on the brief were *Daniel S. Shulman* and *Robert H. Baum.*

J. Robert Murphy, by invitation of the Court, 405 U. S. 972, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In November 1968, petitioner brought an action in the United States District Court for the Northern District of Illinois, seeking damages and injunctive relief for an alleged breach by respondent of their collective-bargaining agreement. The complaint charged that since June 1, 1966, respondent had "continually violated" the contract by refusing to abide by any of its terms, including wage, hiring hall, and fringe benefit provisions. The agreement, which incorporated the terms of master contracts between petitioner and a local contractors' association, provided for arbitration of "any difference . . . between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence."

The District Court dismissed petitioner's action for failure to state a claim and noted, but did not pass upon, two additional contentions of the company—"that (1) no contract was ever created, and (2) . . . if consummated, the agreement was subsequently abandoned by the union." No. 68–C–2091 (April 14, 1969) (unreported). The court suggested that the parties arbitrate the binding effect of their contract. When the company refused to arbitrate either that issue or "the subsequent issues of possible violations," petitioner filed an amended complaint to compel arbitration.

In moving to dismiss the amended complaint, respondent again denied the existence of a binding agreement and argued that the Union's delay in seeking arbitration constituted laches barring enforcement of the contract. The District Court initially denied the motion, holding that "if the employer consented to the alleged collective bargaining agreement, the laches issue should be decided by the arbitrator rather than the federal courts." *Id.* (Aug. 26, 1969). But after conducting an evidentiary hearing on the scope of the ar-

bitration clause, the court entered an order dismissing the complaint. *Id.* (Dec. 4, 1969) (unreported). Though agreeing that respondent "was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause," the court found that there had been no contact between the parties from the time of the signing in 1964 until the summer of 1968. It therefore concluded that the Union was guilty of laches in seeking enforcement:

> "The master agreement contemplates initiation of arbitration proceedings if any dispute is not settled within 48 hours of its occurrence, and further provides that the Board of Arbitrators shall meet 'within six (6) days.' Yet demand for arbitration was not made in this case until April, 1969, almost five years from Flair's first alleged failure to comply with the contract and nearly three years from the inception of the alleged breach sought to be arbitrated.
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> . . . . .
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> "To require Flair to respond, through arbitration, to general charges of noncompliance with contract provisions allegedly beginning more than two years before this suit was filed would impose an extreme burden on its defense efforts. . . . [T]o compel arbitration would reward plaintiff for its own inaction and subject defendant to the risk of liability because of actions taken or not taken in reliance on plaintiff's apparent abandonment."

The Court of Appeals affirmed the order by divided vote. 440 F. 2d 557 (1971). Its opinion read the memorandum of the District Court to hold that the collective-bargaining agreement was still in effect and that therefore the question for decision was "whether a court may properly dismiss the complaint on the basis of laches resulting from dilatory notification of the exist-

ence of a dispute in a suit brought to compel arbitration with regard to the dispute." *Id.*, at 557–558. The court then addressed this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964). There an employer refused to arbitrate on the ground that the union, among other things, had failed to follow grievance procedures required by the collective-bargaining agreement. We ordered arbitration, holding that "[o]nce it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.*, at 557. The Court of Appeals distinguished *Wiley* on the ground that the procedural question there concerned "intrinsic" untimeliness, relating solely to the requirements of the contract. Here, on the other hand, the question was one of "extrinsic" untimeliness, based not on a violation of contract procedures but on the failure to give timely notice under the equitable doctrine of laches. Therefore, according to the court, the matter was within its province to decide, for "'we are not indulging in the judicially unwarranted task of interpreting the collective bargaining agreement.'" 440 F. 2d, at 560, quoting *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F. 2d 586, 591 (CA6 1967). We granted certiorari. 404 U. S. 982 (1971).

Petitioner contends that the Court of Appeals erred in limiting *Wiley* to cases of "intrinsic" delay because the issue of delay, whether "intrinsic" or not, "necessarily involves a determination of the merits of the dispute and bears directly upon the outcome and is accordingly for an arbitrator and not the federal court to decide." Brief for Petitioner 21. In other words, petitioner argues that even if the parties have not agreed to arbitrate the laches issue, *Wiley* requires that the arbitrator resolve

the question as an integral part of the underlying contract dispute.

We need not reach the question posed by petitioner, for we find that the parties did in fact agree to arbitrate the issue of laches here. Although respondent denies that it ever signed a binding contract with petitioner, the District Court found to the contrary and held that the company "was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause." That clause applies to "any difference," whatever it may be, not settled by the parties within 48 hours of occurrence. There is nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration. In that circumstance, we must conclude that the parties meant what they said—that "any difference," which would include the issue of laches raised by respondent at trial, should be referred to the arbitrator for decision.* The District Court ignored the plain meaning of the clause in deciding that issue.

Of course, nothing we say here diminishes the responsibility of a court to determine whether a union and employer have agreed to arbitration. That issue, as well as the scope of the arbitration clause, remains a matter for judicial decision. See *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962). But once a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to "any difference" between them, then a claim that

*Respondent's attorney admitted as much in the hearing before the District Court. Though contending that the binding effect of the contract was an issue for the court, and not the arbitrator, he agreed that "laches is another thing. I can go along on this being an arbitrable question, I suppose, if you have got a contract . . . ." App. 93.

particular grievances are barred by laches is an arbitrable question under the agreement. Compare *Iowa Beef Packers, Inc.* v. *Thompson*, 405 U. S. 228 (1972). Having agreed to the broad clause, the company is obliged to submit its laches defense, even if "extrinsic," to the arbitral process. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, dissenting.

Through the exercise of formal logic the majority reaches a result that I believe is unjust. A full statement of the facts is necessary to put this case in proper perspective. Flair Builders, Inc. (Flair), is a small independent construction firm. The International Union of Operating Engineers, Local 150, AFL–CIO (the Union), had a master collective-bargaining agreement in effect with many contractor associations in Flair's area. On May 12, 1964, the Union and Flair signed a memorandum agreement which adopted the terms of the then-existing master bargaining agreement. The memorandum provided that Flair would be bound by any future master agreement entered between the Union and the contractor associations. Flair had *only one* employee at the time it signed the memorandum agreement with the Union. This employee joined the Union, but left Flair's employment about two weeks later. His job was filled successively by employees who operated the only piece of equipment owned by Flair. None of these successor employees belonged to the Union.

In the ensuing years, Flair prospered and added a modest amount of additional equipment. By 1967 it owned four pieces. Throughout the period from May 1964 until the summer of 1968, Flair operated all of its equipment with nonunion employees. During this period of more

than four years, Flair heard nothing whatever from the Union.

In 1966, without Flair's knowledge, the Union and the contractor associations entered into a new master agreement which contained a provision that: "Should any difference arise between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence, such difference shall be submitted to arbitration." It further provided that the arbitrators should meet within six days after it was determined that the dispute could not be settled. Although Flair was not a party to the new 1966 master agreement, and received no notice of its execution from the Union, the District Court determined that Flair was "bound" by virtue of the incorporation provision in the memorandum agreement signed in 1964.

It is apparent that the Union either forgot about its 1964 agreement with Flair or considered Flair's small operation to be of no consequence. For a long time everyone seemed happy, and things went well. Then in June 1968, *four years* after the agreement was entered, a Union business agent visited Flair. This was the first such visit since May 1964. The business agent found that Flair's four employees were nonunion, and he also complained about their wages. Flair refused to recognize any obligation to the Union.

After the lapse of another five months, on November 7, 1968, the Union filed a complaint against Flair in the District Court seeking specific performance of the alleged collective-bargaining agreement and monetary damages in the amount of $100,000. Flair's motion to dismiss for failure to state a cause of action was sustained by the District Court on April 14, 1969, in a memorandum opinion which suggested that the parties arbitrate their differences. Pursuant to leave of court, the Union filed an amended complaint on June 3, 1969, alleging that on